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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 OZSTAR DE JOURDAY,

12 Plaintiff,

13 vs.

14 JP MORGAN CHASE BANK, N.A., etc.,
15 et al.,

16 Defendants.

CASE NO. 11cv1052-LAB (MDD)

**ORDER DENYING WITHOUT
PREJUDICE PLAINTIFF'S
REQUEST FOR AN EXTENSION
OF TIME TO APPEAL**

17 The Court dismissed De Jourday's claims with prejudice on December 16, 2011.
18 Under Fed. R. App. P. 4(a)(1)(A), he had 30 days, or until January 15, 2012, to file a notice
19 of appeal. He missed that deadline. But three weeks after it had passed, on February 7,
20 2012, De Jourday filed a motion for an extension of time to file a notice of appeal.

21 What is De Jourday's explanation for the delay in filing a notice of appeal? He didn't
22 know there was a time limit. Why? When the Court dismissed his claims, his lawyer told him
23 she didn't handle appeals. Why didn't he seek appellate counsel *then*? The parties
24 continued to negotiate a settlement and he thought they'd reach one. It wasn't until a settle-

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1 ment agreement was drafted and presented to him, however, that he realized they wouldn't,
2 and by that time the 30-day window to appeal had closed.¹

3 De Jourday doesn't come out and say that his trial counsel didn't tell him he had 30
4 days to appeal. Instead, he says that he wasn't advised of the deadline to file a notice of
5 appeal until it had passed, without making it clear when, or from whom, he learned of Rule
6 4(a)(1)(A).² De Jourday first contacted appellate counsel, Gordon & Rees, on January 21,
7 2012. It took that firm about a week to run a conflicts check and determine it couldn't
8 represent him. He retained his current appellate counsel, Pettit Kohn Ingrassia & Lutz, on
9 February 7, 2012. Presumably, De Jourday learned from Gordon & Rees on or around
10 January 21, 2012 that he only had 30 days from December 16, 2011 to file a notice of appeal.

11 The Court can extend De Jourday's time to file a notice of appeal, but only if he shows
12 "excusable neglect or good cause." Fed. R. App. P. 4(a)(5). In looking for excusable neglect,
13 the Court considers the factors identified by the Supreme Court in *Pioneer Investment*
14 *Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). Those factors
15 include: (1) the danger of prejudice to the non-moving party; (2) the length of delay and its
16 potential impact on judicial proceedings; (3) the reason for the delay, including whether it was
17 within the reasonable control of the movant; and (4) whether the moving party's conduct was
18 in good faith. *Id.* at 855. The Ninth Circuit last considered the *Pioneer* factors in *Pincay v.*
19 *Andrews*, 389 F.3d 853 (9th Cir. 2004). The court acknowledged that it and other circuits
20 were somewhat confused in applying them, and it ultimately held that excusable neglect is
21 an elastic concept that's better committed to the sound discretion of a district court than some
22 set of per se rules. *Id.* at 860.

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25 ¹ The Court is somewhat suspicious of this explanation. Once the Court dismissed
26 De Jourday's claims, JP Morgan had *prevailed*. It had no real incentive to settle absent
some indication from De Jourday that he would appeal. On the other hand, JP Morgan does
not contest De Jourday's account in its opposition brief.

27 ² That's also suspicious. The Court has a hard time believing that De Jourday's trial
28 counsel told him she didn't handle appeals and left it at that. If that's actually what
happened, though, the Court would expect De Jourday to specifically say so in his
supporting declaration.

1 In Judge Berzon's concurrence in *Pincay*, she suggested that "*Pioneer* . . . indicates
 2 that a district court may find neglect 'excusable' if it is caught quickly, hurts no one, and is a
 3 real mistake, rather than one feigned for some tactical reason" *Id.* at 860 (Berzon, J.,
 4 concurring). The Court agrees with that reading of *Pioneer*. The problem, though, is that De
 5 Jourday's brief and supporting declaration don't convince the Court that he isn't just playing
 6 hardball and doing whatever it takes to stay in his home. First, he doesn't say, in
 7 unambiguous terms, that his trial counsel Fanny Cheng made no mention whatsoever of a
 8 30-day window to file a notice of appeal when she told him she wasn't an appellate lawyer.
 9 Second, he doesn't say exactly when, or from whom, he learned that he'd missed the
 10 deadline to file a notice of appeal. Third, he provides no evidence that even after the Court
 11 granted JP Morgan's motion to dismiss, settlement discussions continued and he was
 12 eventually presented with a settlement agreement. If this is true, there must be some paper
 13 record of it. If De Jourday can declare that Ms. Cheng said nothing about a deadline to file
 14 a notice of appeal, and if he can prove that settlement discussions with JP Morgan continued
 15 throughout his 30-day window to file a notice of appeal, the Court *might* be inclined to find
 16 "excusable neglect" under the *Pioneer* factors. If he can't, however, the Court will have a
 17 much harder time making that finding.³

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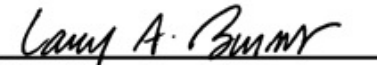
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22 ³ The Court should say that it doesn't find JP Morgan's arguments against an
 23 extension to be highly persuasive, either. One, JP Morgan quotes *Pioneer* for the
 24 proposition that "inadvertence, ignorance of the rules, or mistakes construing the rules do
 25 not usually constitute 'excusable neglect,' but the actual quote begins with the word
 26 "Although" and ends with the recognition that excusable neglect "is a some-what 'elastic
 27 concept' and is not limited strictly to omissions caused by circumstances beyond the control
 28 of the movant." *Pioneer*, 507 U.S. at 392. Two, JP Morgan cites *Kyle v. Campbell Soup*
Co., 28 F.3d 928, 931 (9th Cir. 1994), but that case was decided a decade before *Pincay*
 and the Court in *Pincay* recognized its approach as narrow and confused. *Pincay*, 389 F.3d
 at 857. Three, JP Morgan argues that under *Pincay* a mistake of law is not excusable,
 when in fact the court said "a lawyer's mistake of law in reading a rule of procedure is not a
 compelling excuse" and in context was actually distancing itself from the efforts of sister
 circuits "to fashion a rule making a mistake of law per se inexcusable under Rule 4." *Id.* at
 860-61.

1 De Jourday's motion is **DENIED WITHOUT PREJUDICE**. Within one week from the
2 date this Order is entered, he must file a supplemental declaration, and a short brief if he
3 chooses, that tells a more exact story of how he missed the 30-day window to file a notice of
4 appeal under Fed. R. App. P. 4(a)(1)(A). De Jourday is a sophisticated real estate agent in
5 La Jolla. If he wants the Court to believe that he sincerely thought he could appeal the
6 Court's December 16 order at any time, he must provide a richer account of the facts than
7 he has. JP Morgan needn't file any additional brief on this matter.

8 **IT IS SO ORDERED.**

9 DATED: March 15, 2012

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11 **HONORABLE LARRY ALAN BURNS**
12 United States District Judge
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